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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-310

SPERRY RAND CORPORATION,

Petitioner,

—v.—

DEERE & COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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The purpose of this Supplemental Brief, filed pursuant to Rule 24(5), is to suggest to the Court that its grant of certiorari in No. 75-110, *Sakraida* v. *Ag Pro, Inc.*, on October 14, 1975, furnishes a further reason for the grant of certiorari in the present case.

Sakraida involves review of a series of decisions of the Court of Appeals for the Fifth Circuit which applied the "obviousness-nonobviousness" standard to a combination patent.[1] See 474 F.2d 167, 169, 171-73. As we set forth in the Petition for Certiorari (Pet. 22), the Fifth Circuit applies solely this standard—as taught by the *Graham* case—to combination patents, directly contrary to the approach of the Ninth Circuit below, which applies the "new and sur-

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[1] The Court of Appeals, reversing the District Court, upheld the patent and the infringer petitioned for certiorari.

prising results" test. The petitioner in *Sakraida* has urged the Ninth Circuit's continued adherence to the language of the *A&P* case upon this Court as the proper approach, claiming that *A&P's* "holdings are applicable to the instant case, and govern it." (Petition for Certiorari, No. 75-110, p. 6) The same conflict of standards and of Circuits involved in the "Haybine" case is involved in *Sakraida.*

With *Sakraida,* this Court once again will participate in the adjudication of the question of the proper standard of invention under the patent laws. We respectfully suggest that it would be advantageous to the development of the law and to sound judicial administration to have another factual setting before the Court, in addition to that presented by *Sakraida.* The *Sakraida* case involves a patent on a relatively simple combination system designed to flush cow manure from dairy barns by a sudden flood of water.[2] Surely a decision of this Court which will shape the course of adjudication in patent cases for years to come should be based upon a weightier patent in addition to the one involved in *Sakraida.* To put it delicately, the subject matter of the art there involved is one which may make suspect the claim of invention. And the patent in *Sakraida* was described by the Court of Appeals in upholding it as only "a modest commercial success." 474 F.2d, at 169. Only about 70 dairies apparently used the patent, at a relatively low one-time licensing fee. *Ibid.* Here, with the invention of the "Haybine" and the introduction and mass

[2] We, of course, take no position as to whether the Court of Appeals for the Fifth Circuit's application of the "obviousness-nonobviousness" standard to the patent there involved was correct, although the legal standard applied was, of course, the correct one in our view.

production of other machines copying it, a brand-new category of farm machinery is involved with 25,000 machines sold annually, accounting for approximately $100,000,000 in annual sales volume. (Pet. 10)

Just as at the time of the *Graham-Calmar-Adams* trilogy this Court determined to review cases involving three patents in disparate arts so as to afford itself a diverse inquiry as to a number of patented devices to serve as the factual matrix of its decision, it should at this time also review the present petition involving the "Haybine" patent so as to furnish a broader context for its decision.[3] The patent system is not just the plastic bottle cap involved in the *Calmar* part of the *Graham* trilogy or the manure flusher involved in *Sakraida.* It is also the new and different kind of electric battery reviewed in *United States* v. *Adams,* 383 U.S. 39 (1966), and brand-new items of complex and productive machinery, such as the "Haybine." Review of the present case would contribute to a more balanced picture of the course of patent adjudication, as did the Court's review of the *Adams* and *Calmar* cases together with the *Graham* case.

[3] The *Graham* trilogy did not start out as a trilogy but became a trilogy in response to suggestions similar to those made herein. The Court granted certiorari in *Graham* itself on January 18, 1965. Subsequent to the grant of certiorari, the petition for certiorari in the *Adams* case was filed (February 12, 1965); the Solicitor General there urged that certiorari also be granted in *Adams* in order to afford the Court a "broad perspective" of cases. (Petition for Certiorari, No. 906, O. T. 1964, p. 16) The Petition for Certiorari in *Calmar* was filed on December 22, 1964, but had not been reached when certiorari was granted in *Graham.* A Supplemental Brief was filed in *Calmar,* urging the Court to grant certiorari in *Calmar* as well for the same reasons. On March 29, 1965, the Court granted certiorari in *Calmar* and in *Adams,* ordering that they be argued together with *Graham.*

The grant of certiorari in the present case and its consideration together with the *Sakraida* case would not delay the Court's disposition of its docket. Certiorari was granted in *Sakraida* on October 14, 1975; the present case is now ripe for adjudication on the certiorari phase, and if certiorari were granted, this case could readily be argued together with *Sakraida*.

CONCLUSION

For the reasons stated in the Petition, our Reply Brief and herein, the Petition for Certiorari should be granted.

Respectfully submitted,

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